A

N-VISIO SDN BHD

v.

HORIZON MULTIMEDIA SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[CIVIL SUIT NO: S7-22-309-2008]
28 AUGUST 2009

C ***CIVIL PROCEDURE:*** *Anton Piller Order - Application for - Criteria to be satisfied - Extremely strong prima facie case - Applicant facing serious damage - Clear evidence of possession of incriminating material and real possibility of destruction*

D ***CIVIL PROCEDURE:*** *Anton Piller Order - Application to set aside - Grounds for setting aside - Whether order improperly granted - Whether defendant gravely prejudiced*

CIVIL PROCEDURE: *Anton Piller Order - Ex parte application - Whether application must subsequently be heard inter partes - Whether*
E *provisions of O. 29 r. 1(2B) Rules of the High Court 1980 applicable to Anton Piller orders*

The plaintiff had commenced an action against the 1st defendant claiming that the 1st defendant had made unauthorized use of the
F plaintiff's 'short dialing codes' as a result of which the plaintiff had suffered loss of income. The 2nd, 3rd and 5th defendants who used to hold high ranking posts in the plaintiff's company had left and joined the 1st defendant. The 4th and 6th defendants were the directors of the 1st defendant. The plaintiff had on 3 April 2008,
G *vide* its application in encl. 2, obtained an *ex parte* Anton Piller Order ('APO') against the 1st defendant with the usual undertaking as to damages. Pursuant to the *ex parte* APO, the 1st defendant had to allow the plaintiff and/or its agent to enter the 1st defendant's premises to inspect documents relating to its business which were
H relevant to the suit. Following that, encl. 2 came up for *inter partes* hearing together with encl. 14 which was the 6th defendant's application to set aside the *ex parte* APO on grounds that the APO was not regularly served on the 6th defendant and the plaintiff was not in a financial position to fulfill its undertaking as to damages.

I

Held:

(1) The provisions of O. 29 r. 1(2B) of the Rules of the High Court 1980 is not applicable to an APO. Therefore, since the provision of 21 days period is not applicable to APOs, there is no necessity to give a return date for an *inter partes* hearing. However, an *ex parte* APO may be subjected to a discharge if the situation warrants it. Application for discharge of any APO has to be made within a reasonable period of time. (para 20)

(2) The threshold for the applicant to satisfy the court in applying for an APO is very high. Because such an order is essentially unfair to the accused party, APOs are only issued exceptionally, when: (a) There is an extremely strong *prima facie* case against the defendant; (b) The damage, potential or actual, must be very serious for the applicant; and (c) there must be clear evidence that the defendants have in their possession incriminating documents or things and that there is a real possibility that they may destroy such material before the disposal of the main trial. (para 22)

(3) Bearing in mind the nature of an APO, it does not serve any purpose for an APO which had been served, executed and spent, to proceed for an *inter partes* hearing. Subsequent hearing would only follow if the defendant wishes to set aside the *ex parte* order on grounds that it had been improperly granted or that the defendant had been caused grave prejudice or that it had caused an injustice to the defendant. (para 28)

(4) Since the APO had already been executed and spent, there was no further need or purpose to proceed with the *inter partes* hearing anymore. By not proceeding with the *inter partes* hearing, it by no means meant that the said order was wrong or withdrawn. It was for the defendants to apply for the discharge/setting aside of the *ex parte* order if the defendant was of the view that it had been wrongly granted by the court. The defendants had not done so. (paras 32 & 38)

(5) The APO was against the 1st defendant. The *ex parte* APO was served on the 6th defendant in her capacity as the Director of the 1st defendant, not in her capacity as the 6th defendant in the main suit herein. It was not the 6th defendant's personal premises that the plaintiff was entering. The 6th defendant did

not derive personal capacity to set aside the *ex parte* order. The 1st defendant had not made any application to set aside the *ex parte* APO. Therefore the 6th defendant was not entitled to any costs when the plaintiff did not proceed with the *inter partes* hearing of encl. 2. She had no locus to apply to set aside the *ex parte* order dated 3 April 2008. Enclosure 14 was therefore dismissed with costs. (paras 42, 43 & 44)

Case(s) referred to:
Anton Piller KG v. Manufacturing Processes Ltd & Ors [1976] 1 All ER 779 ***(refd)***
Booker Mc Connell Plc & Anor v. Plascow & Ors [1985] RPC 425 ***(refd)***
Columbia Picture Industries Inc v. Robinson [1986] 3 All ER 338 ***(refd)***
ESPL (M) Sdn Bhd v. Harbert International Est Sdn Bhd [2003] 2 AMR 724 ***(refd)***
GMX Associates Pte Ltd & Anor v. Lee Yew Pooi [1998] 5 CLJ 245 HC ***(refd)***
Television Broadcasts Ltd & Ors v. Mandarin Video Holdings Sdn Bhd [1983] 2 MLJ 346 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 29 r. 1(2A), (2B)

Other source(s) referred to:
Mark SW Hoyle, *The Mareva Injunction and related Orders,* 3rd edn, p 107

For the plaintiff - Gideon Tan (Tan Yew Aik with him); M/s Gideon Tan Razali Zaini
For the 1st & 4th defendants - WW Wong; M/s Kadir Andri & Partners
For the 6th defendant - Colin Pereira; M/s Goh Wong Pereira

Reported by Amutha Suppayah

JUDGMENT

Zabariah Mohd Yusof J:

[1] This is the application in encl. 2 ie, the plaintiff's application *(inter partes)* for an Anton Piller Order against the 1st defendant. encl. 2 was heard together with encl. 14 ie, the 6th defendant's application to set aside the *ex parte* Anton Piller Order.

Brief Facts

[2] The plaintiff is an IT multimedia company which provides an electronic gateway between telecommunication companies providing mobile content (Television stations) and mobile networks to Digi,

Celcom and Maxis (telcos). Mobile users who uses the content/ platforms aired by the television telcos will connect to the contents/ platforms by dialing short codes provided by telcos.

[3] The plaintiff had a contract with the telcos for the sole use of the short codes of 33838, 33999 and 32277 and had been servicing the one time set up fees and the monthly maintenance charges for such usage.

[4] The 2nd, 3rd and the 5th defendant used to hold high ranking posts in the plaintiff's company and were responsible in the management and business of the plaintiff in Malaysia.

[5] The 4th and the 6th defendants are the directors cum shareholders of the 1st defendant of Info Business Research & Consulting Sdn. Bhd. which had been involved in providing financial consultancy services to the plaintiff. In the course of providing consultancy services to the plaintiff, detailed information relating to business and marketing and investment plans of the plaintiff, not limited to financial accounts was furnished to them.

[6] It was subsequently discovered by the plaintiff that there had been rapid decrease in the plaintiff's revenue in the month of November and December 2007 and the 2nd defendant who was then the Director and Chief Executive Officer of the plaintiff at the material time could not give a reasonable explanation. Investigations revealed that there were transfers of short codes to the 1st Defendant by Celcom Mobile Sdn Bhd followed by Digi Tel. and then Maxis. The plaintiff did not receive any income thereafter which they were entitled to, which was derived from the use of the short codes since November 2007.

[7] The 2nd, 3rd and the 5th defendant left the employment of the plaintiff one after the other on or before the investigation on the decline of revenue of the plaintiff. They subsequently joined the 1st defendant. Other key employees of the plaintiff was also found to have followed suit and left the employment of the plaintiff to join the 1st defendant.

[8] The plaintiff's cause of action against the 2nd, 3rd and 4th defendants is that as employees of the plaintiff, they have conspired to interfere with the plaintiff's business and committed the tort of conversion, in particular the transfer of the short codes without the knowledge of the plaintiff's Board of Directors and until no income were generated since the month of November 2007. The plaintiff

alleged that it was suspicious that the 2nd defendant was unable to provide an explanation for the decrease in revenue of the plaintiff at the material time, during the meeting where queries were posed to the 2nd defendant, who was then the Director and Chief Executive Officer for the plaintiff.

[9] As far as the action by the plaintiff against the 4th and 6th defendants is concerned, the cause of action by the plaintiff against these 2 individuals is the unlawful use of the plaintiff's confidential information. Company search shows that the 4th and the 6th defendants, who were previously providing financial services to the plaintiff *vide* Info Business Research & Consulting Sdn. Bhd. are the directors for the 1st defendant. The plaintiff alleged that the culpability of the 4th and the 6th defendants in the theft of the business is plain and obvious. The 6th defendant is both the shareholder and director of Info Business Research & Consulting Sdn. Bhd. which used to have access and had the possession of the plaintiff's confidential information. At the same time she is a founder of the 1st defendant who then conveniently siphoned the business of the plaintiff and conspired with others in setting up the 1st defendant which runs the same nature of business as the plaintiff.

[10] Subsequently the plaintiff filed encl. 2 for an *ex parte* Anton Piller order, *inter alia*, for the 1st defendant to allow the plaintiff and/or its agent to enter the 1st defendant's premises in Damansara Utama and Bandar Utama to inspect the 1st defendant's copies of documents relating to its business; the 1st defendant to inform the plaintiff the locations of all relevant documents after the inspection for the purpose of this suit.

[11] The plaintiff's grounds for the application of the Anton Piller Order was that the plaintiff was able to show a strong *prima facie* case against the defendants and the plaintiff had sufficient evidence to prove at the trial the liabilities of the defendants. However the plaintiff did not have the "the best possible evidence" to prove damages and these documents were documents which happened to be in the possession of the 1st defendant. The plaintiff contended that the documents would show the amount and the value of the short codes ie, how much business had been derived from the use of the plaintiff's short codes. It was further argued that without such documents the plaintiff would be unable to plead the damages and in effect this case would have to be concluded by way of

lengthy two stages process which are first to prove liability and thereafter to go through lengthy assessment of damages hearing. It was also contended by the plaintiff that the conduct of the 4th, 5th and the 6th defendants were to blatantly disregard the interest of the plaintiff and therefore, dishonestly and lacking in probity by diverting the business of the plaintiff to the 1st defendant, eventually a company which was in control by themselves, depriving the plaintiff of its entire business, and soliciting the key employees from the plaintiff to the 1st defendant. This alleged perpetration by the defendants is an outright theft of the plaintiff's business and based on the facts there is no denying that whilst during their employment with the plaintiff, the defendants have dishonestly planned to injure the business by first transferring the short codes of the plaintiff knowing that the mainstream of the source of income of the plaintiff are the short codes.

[12] Subsequently, the court on 3 April 2008 granted an *ex parte* order of the Anton Piller against the 1st defendants for encl. 2 with the usual undertaking as to damages.

[13] Following that, the case came before me for the the *inter parte* hearing of the said encl. 2. This encl. 2 was heard together with encl. 14.

[14] Enclosure 14 is the application by the 6th defendant to set aside the *ex parte* Anton Piller Order dated 3 April 2008 on grounds that the said order was not regularly served on the 6th defendant and the plaintiff is not in a financial position to fulfill its undertaking as to damages. The 6th defendant is not in possession of the evidence required to be handed over by the order, thus, is in no position to comply with the order.

Enclosure 2

[15] At the start of the hearing of *inter partes* of encl. 2, Mr Gideon Tan, counsel for the plaintiff had indicated to the court that he was of the view that as far as an Anton Piller order is concerned, once it is granted by the court, (*ex parte* though it may be), there is no necessity for an *inter partes* hearing to proceed, especially in situation where the *ex parte* order had been executed and spent.

[16] Both parties submitted before me on this point. After due consideration of their submissions and the provisions in our Rules of the High Court 1980 and the authorities cited by both parties I agree with the view as advanced by Mr. Gideon Tan, counsel for the plaintiff that there is no necessity for an *inter partes* hearing of the Anton Piller order which had been given *ex parte* on 3 April 2008. Below are my reasons:

[17] The provisions of O. 29 r. 1(2B) of the Rules of the High Court 1980 relates to interim injunctions and it states that an *ex parte* interim injunction once obtained lasts for 21 days.

[18] However, case law authorities have shown that the provision of 21 days is not applicable to Anton Piller Orders. This was succinctly ruled in the case of *GMX Associates Pte Ltd & Anor v. Lee Yew Pooi* [1998] 5 CLJ 245 by Steve Shim Lip Kiong, J at p. 247 where he states thus:

> … In my view, the provisions of O. 29 r. 1(2B) of the Rules of the High Court are clear enough. They relate specifically to interim injunctions. **Nothing can be construed therein to include Anton Piller orders** … (emphasis added)

[19] Further at p. 248:

> Though the authorities have established that in appropriate cases, the court has the power to discharge Anton Piller orders even after they have been executed, it is however unclear as to when the application for such discharge ought to be done. In the case of interim injunctions … in my view, this two week limitation does not apply to an Anton Piller order, although off course effluxion of time may weigh against discharge of such order. This is quite evident in the case of *Columbia Pictures Industry Inc v. Robinson* [1987] Ch 38 where there was an application to discharge an Anton Pillar order which had apparently been executed some years previously. In that case, the court refused the application on the ground of material non-disclosure by the plaintiff. In my view, any such application for discharge or to set aside an Anton Piller order must necessarily be made within a reasonable time after the grant of the order. What is a reasonable time is a question of fact to be decided by the court upon the particular facts and circumstances of the case.

[20] The point which can be derived from the above passage of the judgment is that O. 29 r. 1(2B) Rules of the High Court 1980 is not applicable to an Anton Piller Order. Therefore since the provision of 21 days period is not applicable to Anton Piller orders, then there is no necessity to give a return date for an *inter partes*

hearing. However, an *ex parte* Anton Piller order may be subjected to a discharge if the situation warrants it and any application of a discharge of any Anton Piller order has to be made within a reasonable period of time. This particular point is further amplified by the court in the same case where Steve Shim J further ruled that the preliminary objection by the counsel for the plaintiff who contended that at the time of the application to set aside the *ex parte* order, the order had lapsed, that it had automatically expired/lapsed and as such there was no longer any interim injunction to be set aside and consequently the other reliefs sought must suffer, is only sustainable as against the other orders (which was a non Anton Piller order), except that it cannot stand against the Anton Piller order therein.

[21] Essentially, Anton Piller order is a court order which provides for the right to search premises without prior warning. This is used in order to prevent the destruction of incriminating evidence. The first of such order was issued in the case of *Anton Piller KG v. Manufacturing Processes Ltd & Ors* [1976] 1 All ER 779). The order authorizes the plaintiff to enter upon the premises of the defendant to search for documents or articles which is needed for the plaintiff's case, to take/make copies or remove them from the premises to be kept in safe custody by the plaintiff's solicitors. Effectively, it is to ensure that the evidential document or articles which are crucial to the plaintiff's case would not be destroyed or concealed pending disposal of the plaintiff's case. The primary purpose of the Anton Piller Order is to preserve evidence which is essential and relevant to the plaintiff's case. (Refer to the case of *ESPL (M) Sdn Bhd v. Harbert International Est Sdn Bhd* [2003] 2 AMR 724; *Columbia Picture Industries Inc v. Robinson* [1986] 3 All ER 338 at pp 367 and 371; and *Television Broadcasts Ltd & Ors v. Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346).

[22] An Anton Piller order is a very harsh and draconian order obtained against the defendant. It is a heavy burden and the threshold for the applicant to satisfy the court in applying for an Anton Piller order is very high. Because such an order is essentially unfair to the accused party, Anton Piller orders are only issued exceptionally, when:

A There is an extremely strong *prima facie* case against the Defendant,

The damage, potential or actual, must be very serious for the applicant, and

There must be clear evidence that the Defendants have in their
B possession incriminating documents or things and that there is a real possibility that they may destroy such material before the disposal of the main trial.

[23] Due to the very nature of the order which is to prevent the
C destruction or loss of material and relevant evidence, hence more often than not the court will be moved discreetly and speedily for an *ex parte* order without the knowledge of the defendant. It would come as a surprise to the defendant.

[24] Mark S.W Hoyle in his book *"The Mareva Injunction and*
D *related Orders"* 3rd edn at p. 107 clearly explains the nature of Anton Piller as follows:

Anton Piller orders are potentially as far-reaching as Mareva Injunction and involve many potential difficulties, not only because
E of consequenent interference with the rights of individuals and companies, but also because of the effect on third parties. Anton Piller orders can be described as a formidable ally in preserving evidence and preventing empty judgment.

The Anton Piller order, designed to prevent the destruction of
F evidence and/or the subject matter of a dispute, is a mandatory order placing a heavy burden on a defendant. It usually comes as a surprise to the recipient of the order, and is only effective if it is planned and executed efficiently and discreetly. By its nature it can do great harm to a defendant, and the courts have always been careful to emphasize the extraordinary nature of the order.

G

[25] At the *ex parte* stage the order may/may not be executed fully depending on the circumstances of the case. In other words, the plaintiff would have executed the search of the defendant's premises and obtained the relevant documents pursuant to the *ex parte* order.
H In situation where the *ex parte* order had been fully executed, the purpose of the order had been served, there is no necessity for the hearing of the *inter partes*. Furthermore the period of 21 days as stipulated under O. 29 r. 1(2B) of the Rules of High Court 1980 is not applicable, thus rendering the absence of the necessity for an
I *inter partes* hearing.

[26] There are no Malaysian cases on this point. Cases like *ESPL (M) Sdn Bhd v. Harbert International Est Sdn Bhd* and *GMX Associates Pte Ltd & Anor v. Lee Yew Pooi*, did not address specifically on this point and neither did it state that parties are to proceed/or not to proceed for *inter partes* hearing of the Anton Piller order after the *ex parte* order had been granted.

[27] However, English cases over the years seems to recognize that after an *ex parte* Anton Piller Order had been granted there is no necessity for the plaintiff to bring it forward, however the court would always entertain an application for the discharge of an Anton Piller order because of the undertaking as to damages, ie, if the order had been obtained wrongfully and there is the necessity to assess for damages incurred by the defendant. But nowhere does the cases states that parties are to proceed for an *inter partes* hearing subsequently after an *ex parte* order had been granted.

[28] Bearing in mind the nature of an Anton Piller order, it does not serve any purpose for an Anton Piller Order which had been served, executed and spent, to proceed for an *inter partes* hearing. Subsequent hearing would only follow if the defendant wishes to set aside the *ex parte* order on grounds that it had been improperly granted or that the defendant had caused grave prejudice or that it had caused an injustice to the defendant. Support for this proposition can be found in the case of *Booker Mc Connell Plc & Anor v. Plascow & Ors* [1985] RPC 425 whereby the court succinctly ruled thus:

> The retrospective discharge of fully executed Anton Piller Orders:
>
> Since this was raised as an issue or principle, it is convenient to deal with it before turning to the parties' other contentions. There are two decisions of this court which clearly show, I think, that even a fully executed order can be discharged if it is established that it should never have been made. Indeed, this must be so whenever a defendant raises this contention and seeks to enforce the plaintiffs cross-undertaking in damages on the basis of which the order against him was made.
>
> In *WEA Records Ltd v. Visions Channel 4 Ltd* [1983] 1 WLR 721; [1984] FSR 404, this court considered an appeal by defendants against whom an Anton Piller order had been made and successfully executed. They then sought to have the order set aside in the Chancery Division. However, their application came before this court on a purported appeal, before any order on this application

had been made at first instance, because both parties agreed that there would be an appeal in any event. Not surprisingly, this procedure was emphatically rejected in this court. For present purposes, however, it is interesting to note that at pages 727 to 728 Sir John Donaldson MR said:

> If it were now clear that the defendants had suffered any injustice by the making of the order, taking account of all relevant evidence including the affidavits of the personal defendants and the fruits of the search, the defendants would have their remedy in the counter-undertakings as to damages. But this is a matter to be investigated by the High Court judge who is seised of the matter, and only when he has reached a decision can this court be concerned.

That case was considered in another decision of this court to which we were referred, *Randolph M Fields v. Alison Watts*, The Times 22 November 1984. It concerned an Anton Piller order against certain members of the Bar. They applied to have it discharged after it had been largely executed, though parts of the order remained to be complied with, particular the swearing of an affidavit. The Judge at first instance decline to set the order aside, but an appeal to this court was allowed.

After pointing out that the order had not yet been fully executed, O'Connor LJ said at page 23 of the transcript:

> But leave that aside. If an order has been obtained on a wrong basis, I am satisfied that the proper order for this court to make, when the matter comes before it – and which should have been made, … is to discharge the order *ab initio*, although the search and seize part of the order has been completed. I find nothing in *WEA Records Ltd v. Visions Channe*l 4 Ltd which debars a court from discharging an order which has been improperly obtained, and I would discharge this order,

…

However, there remains the question at what stage of the action this should be done. *If the sole reason for seeking a retrospective discharge of the order is to enforce the cross-undertaking as to damages, then I can see no ground for any immediate application. Any issues as to the validity of the order or as to the consequences of its invalidity should generally be left to be dealt with at the trial of the action.* If the action is settled, then any disputes concerning the order are likely to be settled as well. But exceptional cases can arise if a defendant is in some way affected in his reputation or otherwise by the fact that

> the order remains apparently valid in the interim. *Fields v. Watts* was such a case, and I have already indicated that the article in The Grocer and the pending inquiry by the Monopolies and Mergers Commission in my view are justified an immediate application in the present case. … (emphasis added)

[29] What is interesting as stated in the case cited above is that the court ruled that if the only reason for the application of the discharge of the order is on the issue of damages, then there is no necessity to have the application heard immediately. That can be done at the end of the case when the judge can have a full appraisal of the evidence before him. This further supports the proposition that there is no further need for an *inter partes* hearing of an *ex parte* Anton Piller Order.

[30] There is no similar provision in the English Laws as our O. 29 r. 1(2A) or (2B) of the Rules of the High Court 1980 at the time when Booker Mc Connell Plc was decided. The practice in the U.K. is that once an *ex parte* order is granted, a return date is provided where both parties attend court to argue before the court. The alternative position is that the parties apply to set aside the *ex parte* order.

[31] In Malaysia however we have codified this practice of giving an *inter parte* hearing after an *ex parte* order of an interim injunction is granted. As had been ruled by Steve Shim Lip Keong J in the case of *GMX Associates Pte Ltd & Anor v. Lee Yew Pooi*, the 21 days rule is irrelevant in an Anton Piller order. However it would be prudent for the court to give a return date after an *ex parte* Anton Piller Order is granted.

[32] Since in our present case the plaintiff's counsel submits that the *ex parte* Anton Piller Order had been fully executed and spent, then following from the English cases abovementioned, I do not find the necessity to proceed with the *inter partes* hearing. Further, as the provision of O. 29 r. (2B) Rules of the High Court 1980 as to the 21 days is inapplicable in our case, there is nothing more to extend as in the case of an interim injunction. However, it is open to the defendant to apply to set aside the *ex parte* order if they think that the same was wrongly granted by the court.

[33] Counsel for the 6th defendant submits that with reference to the *ex parte* order at para 12, it specifically states that the said encl. 2 is to proceed with *inter partes* hearing. Since the application is

already before this court, then the court is minded to determine the application as to whether to grant the Anton Piller order on an *inter parte* basis or to dismiss it.

[34] Counsel further submits that since counsel for the plaintiff is not proceeding with the *inter partes* hearing, then counsel sought for the court to strike out the application and to leave the issue of costs to be determined which is to be borne by the plaintiff. He submits that when the plaintiff's counsel chose not to proceed with the *inter partes* hearing of the Anton Piller order application then it would mean that encl. 2 is therefore withdrawn and hence the 6th defendant is entitled to costs for the reasons that:

(i) The name of the 6th defendant appears as a defendant in the suit. The 6th defendant was forced to appear and had filed the necessary papers to oppose this application which had occasioned costs to the 6th defendant;

(ii) Plaintiff had waited until the 11th hour to decide not to proceed with the hearing of the *inter partes* Anton Piller order.

[35] Counsel for the 1st and the 4th defendants adopted the submission of the 6th defendant and insisted that costs is to be borne by the plaintiff as the effect of the plaintiff in not proceeding with the *inter partes* hearing is a withdrawal of the Anton Piller application in encl. 2. Counsel further submits that the plaintiff after obtaining the *ex parte* order had searched the 1st defendant's premises and obtained documents belonging to the 1st defendant. Since the plaintiff is withdrawing its application for the *inter partes* hearing of encl. 2, then whatever documents or photocopies thereof that had been seized from the 1st defendant's premises pursuant to the *ex parte* order ought to be returned to the 1st defendant, and the plaintiff is to be excluded from relying or referring to those documents in the action herein. The 1st defendant sees this as an abuse of courts process for the plaintiff to move the court for an *ex parte* order, search through the premises of the 1st defendant and then not prepared to proceed with the *inter parte* hearing of encl. 2. Documents which were obtained through abuse of courts process were obtained unlawfully and hence cannot be relied on.

[36] With respect to counsel for the defendants, the argument by the counsel was flawed. The fact that the plaintiff is not proceeding with the *inter partes* hearing of the Anton Piller Order in encl. 2 does not amount to the withdrawal of the application for the Anton Piller Order of encl. 2. There had not been any application by the

plaintiff for the withdrawal of the Anton Piller order granted *ex parte* on 3 April 2008. As far as the *ex parte* Anton Piller Order which had been granted by this court on 3 April 2008, it stands good, until and unless it is set aside. (Refer to the case of *GMX Associates Pte Ltd & Anor v. Lee Yew Pooi.*

[37] As for para 12 of the *ex parte* order where it provides for the return date for the *inter partes* hearing that is a matter of practice which is normally done by the courts in the usual course of events pursuant to O. 29 r. (2B) of the RHC 1980 after an *ex parte* injunction order is granted.

[38] In our present circumstances where the Anton Piller Order has already been executed and spent, there is no further need or purpose to proceed with the *inter partes* hearing anymore. By not proceeding with the *inter partes* hearing, it by no means meant that the said order was wrong or withdrawn. I repeat again here that, it is for the defendants to apply for the discharge/setting aside of the *ex parte* order if the defendant is of the view that it had been wrongly granted by the court. The defendants have not done so in the present situation. Until that happens, the *ex parte* order dated 3 April 2008 stands. Hence the argument by the defendant's counsel that encl. 2 is withdrawn is clearly misconceived.

[39] Accordingly, the issue of costs does not arise as the validity of the *ex parte* order has not been challenged to date. Similarly, the issue in returning the documents obtained and taken by the plaintiff from the premises of the 1st defendant, does not arise.

[40] Therefore, premised on the above, I do no see the need to proceed with the *inter partes* hearing of encl. 2. Costs in the cause.

Enclosure 14

[41] This is the 6th defendant's application to set aside the *ex parte* order Anton Piller Order dated 3 April 2008 which had been served on her.

[42] It is to be noted that the 6th defendant has been cited as a co-defendant in the main suit therein. However as far as the Anton Piller Order is concerned it is against the 1st defendant. The 6th defendant happens to be the Director in the 1st defendant. The *ex parte* Anton Piller Order was served on the 6th defendant in her capacity as the Director of the 1st defendant, not in her capacity as

A the 6th defendant in the main suit herein. It is not the 6th defendant's personal premises that the plaintiff was entering. The *ex parte* order was on the 1st defendant. The 1st defendant being a company would have officers to act for it, hence the order was served on the 6th defendant. The 6th defendant has no role to play
B as far as the Anton Piller Order is concerned, except as Director of the 1st defendant in instructing her officers or subordinates to comply with the *ex parte* Anton Piller Order served on the 1st defendant.

C **[43]** The 6th defendant does not derive personal capacity to set aside the *ex parte* order. She, however could have instructed counsel to set aside the *ex parte* order on behalf of the 1st defendant. Here, the circumstances and facts shows that the 1st defendant has not made any application to set aside the *ex parte* Anton Piller Order.

D **[44]** Therefore the 6th defendant is thus not entitled to any costs when the plaintiff did not proceed with the *inter partes* hearing of encl. 2. She has no locus to apply to set aside the *ex parte* order dated 3 April 2008. I hereby dismiss the application by the 6th defendant in encl. 14 with costs.

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